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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)

Advanced Television Systems)
and Their Impact Upon the)
Existing Television Broadcast)
Service)

MM Docket No. 87-268

COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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November 20, 1995

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**COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.**

The National Cable Television Association, Inc. ("NCTA") hereby submits its comments on the Commission's Fourth Further Notice of Proposed Rulemaking and Third Notice of Inquiry ("Fourth Notice") on advanced television and its impact on the existing television broadcast service. NCTA is the principal trade association of the cable television industry, representing the owners and operators of cable systems serving 80 percent of the nation's 80 million cable households. Its members also include cable programming networks, cable equipment manufacturers and others affiliated with the cable television industry.

INTRODUCTION AND SUMMARY

In its Fourth Notice, the Commission reexamines policy decisions regarding an advanced television ("ATV") system for broadcast licensees in light of recent technological changes. The Commission intends to inaugurate

the era of *digital* television, which has the potential to transform local broadcast stations into multi-channel, multi-service providers, in the same spectrum originally intended for transition to the vastly improved picture and sound quality of high definition television ("HDTV"). Under the Fourth Notice, broadcasters would have the flexibility to use the second 6 MHz channel for a myriad of new digital services, including multicast standard definition television ("SDTV"), HDTV, data and other video and non-video services.¹

The Commission inquires about the impact of these new services on cable carriage obligations. We believe that the protectionism currently accorded one-channel analog broadcast stations under the existing must carry regime is unconstitutional. Given the legal uncertainty of the current must carry rules, it is, at a minimum, premature for the Government to compel carriage of additional services at this time. But even if the court sustains the rules, there is no justification for expanding broadcasters' carriage rights beyond their existing analog channels. Under Supreme Court precedent, the Government would have to show a real threat to the system of free broadcasting without carriage of these signals -- a constitutional burden that we submit cannot be met in today's broadcast environment, Turner Broadcasting System v. FCC, 114 S.Ct. 2445 (1994), and surely evaporates in the context of multi-channel broadcast carriage.

¹ Fourth Notice at ¶3-4. SDTV offers picture quality that is essentially equivalent to the current NTSC television picture. Digitally compressed SDTV will enable broadcasters to transmit multiple simultaneous program services, and a mix of other services, such as data, subscription video, video storage, video games, program enhancement services, and electronic newspapers." See e.g. "Turning data streams into revenue streams," Broadcasting and Cable, April 10, 1995 at 32; "Fox sees digital as more than HDTV," Id. at 30. As the Commission describes it, broadcasters will be able to "provide a range of services dynamically, that is, it allows them to switch easily and quickly from one type of service to another." Fourth Notice at ¶4.

Moreover, the relevant statute, the 1992 Cable Act, only directs the FCC to consider any modifications to the must carry rules after it adopts new advanced television standards and then only to ensure signal quality for stations that have converted to the new standards. Commission action is, at a minimum, too early because standards have not yet been adopted and in any event would be strictly limited under the Act. There is no other provision in the Act or its legislative history to support must carry status for ATV channels. And certainly Congress did not provide for then unknown digital broadcast services during the initial start-up and transition to digital broadcasting or thereafter.

If mandatory carriage requirements are still in place once broadcasters convert to digital and return the analog spectrum to the Government, then those requirements will have to be applied in a digital environment. But for the real world of today, broadcasters should not be handed over carriage rights beyond their existing analog channels. Extending must carry could devastate cable programmers and would virtually obliterate cable operators' editorial discretion. As the courts have repeatedly observed, mandatory carriage rules infringe on cable operators' ability to respond to viewer preferences and injure cable programmers by cutting off their access to viewers and putting them at a competitive disadvantage vis-à-vis broadcast stations.

Even if the Commission decides not to impose additional must carry obligations for new digital broadcast services, the agency should adopt regulations to prevent broadcast stations from unfairly leveraging their retransmission consent rights by demanding carriage of these signals.

Without such safeguards, the power of the retransmission consent provisions may outweigh any rules the FCC adopts regarding must carry.

Lastly, as the Commission proceeds with standards for digital broadcasting, it should not impose these standards on cable or other video distribution media. This is critical. The final broadcast digital standard will undoubtedly be optimized for broadcast television which may or may not be optimal for cable and other media. The Commission should allow each medium to maximize its unique capabilities and deliver digital signals in the way that best serves its customers.

I. THE COMMISSION SHOULD NOT IMPOSE MUST CARRY REQUIREMENTS FOR NEW DIGITAL BROADCAST SERVICES

The advent of digital broadcast television has significant ramifications for cable television. With over 60 percent of American households receiving their broadcast signals via cable, the cable industry recognized early on the importance of working with broadcasters and manufacturers to ensure that cable systems deliver a high quality HDTV broadcast signal. Over the past eight years, the cable industry has actively participated in the Commission's ATV standards-setting process, investing millions of dollars in the planning, testing and implementation of a broadcast HDTV system compatible with cable television. In September of this year, CableLabs successfully completed laboratory and field testing of the Grand Alliance's prototype digital high definition system over eight different cable systems in the Charlotte, North Carolina area.

Throughout this proceeding, the Commission's goal in authorizing a second channel was "not to launch a new and separate video service"² but to

² Tentative Decision and Further Notice of Inquiry, MM Docket No. 87-268, 3 FCC Red 6520, 6537 (1988).

permit broadcasters “to move to an improved technology without service interruption.”³ NCTA supported the migration of the terrestrial broadcast system to a simulcast HDTV service and the return of the NTSC spectrum for re-allocation by the Commission at the earliest possible time.⁴ But we expressed concern about the implications of new HDTV channels for must carry. Then, as now, and for the future, the carriage of dual NTSC/HDTV channels would be an intrusive burden on cable systems with significant capacity constraints and wholly unfair to cable programmers who would be denied carriage.⁵

We continue to believe that the public will benefit from the visual and audio enhancements of true high definition technology. But the evolution in digital compression technology has significantly changed the equation. Now that the focus of this proceeding has shifted to the authorization of new, as yet unknown and untested, digital services, the carriage issue is equally, if not more, of concern to cable systems. If broadcasters are to be granted additional spectrum and the flexibility to use it for a range of new services unrelated to or in combination with HDTV, this should not be accomplished by further intrusions into cable operator and cable programmer First

³ Second Report and Order/Further Notice of Proposed Rulemaking, MM Docket No. 87-268, 7 FCC Rcd. 3340, 3342 (1992) (“ATV represents a major advance in television technology, not the start of a new and separate video service.”).

⁴ See, e.g., NCTA Comments, MM Docket No. 87-268, July 17, 1992; NCTA Reply Comments, MM Docket No. 87-268, August 17, 1992; NCTA Reply Comments, MM Docket No. 87-268, February 8, 1993. We supported the commonly known definition of “simulcasting”, the contraction of “simultaneous broadcast”, that is the broadcast of one program over two channels to the same area at the same time.” First Report and Order, MM Docket No. 87-268, 5 FCC Rcd 5627, 5628 (1990).

⁵ See e.g., NCTA Comments, MM Docket No. 87-268, July 17, 1992 at 7.

Amendment rights or to the disadvantage of customers seeking the programming diversity afforded by cable service.

A. Government Modification or Expansion of Must Carry Obligations is Premature and Contrary to the Cable Act

For the first time in this proceeding, the Commission squarely addresses the impact of ATV on cable television carriage and retransmission consent obligations under the Communications Act, 47 U.S.C. §§521 et seq. It seeks comment on the policies that should govern cable carriage during the broadcast industry's transition from NTSC to digital television when two 6 MHz channels will be transmitted by each licensee and the applicability of mandatory carriage rules once broadcasters have converted entirely to a digital format.

The 1992 Cable Act requires cable systems to allocate up to one-third of their activated channel capacity for the carriage of local commercial television stations. 47 U.S.C. §534(b)(1)(B). In addition, operators must carry local noncommercial educational television stations over and above the one-third cap. 47 U.S.C. §534. Furthermore, the Act requires cable operators to place broadcast stations in a preferred channel position and mandates their inclusion in the basic tier (which must be provided to all subscribers before they can purchase any other tier of programming). 47 U.S.C. §534.

Congress was very specific about operators' carriage obligations and responsibilities: it did not mandate carriage of ATV channels or other new broadcast services. In Section 614 of the must carry provisions, under the heading "Signal Quality", Congress directed:

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal

carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

47 U.S.C. §534(b)(4)(B) (emphasis added). The statute assumes the existence of modified standards. None have been “modified” yet. Accordingly, it is premature under the statute for the Commission to consider any changes to the mandatory carriage rules for cable television because it has not yet adopted new advanced television standards for broadcasters.

Nevertheless, it is evident that Congress' concern in Section 614 was ensuring that once a single-channel broadcast station changed to a new ATV technical standard, the must carry rules would need to be modified to maintain retransmission of a high quality signal by cable. The statutory concern for ensuring signal quality is further bolstered by the legislative history of the Act. It indicates that Congress envisioned ATV as improved picture quality and foresaw the need to change the must carry rules “to ensure that cable systems will carry television signals complying with such modified standards” as “high definition television”.⁶ This has everything to do with quality standards and has nothing to do with increasing the carriage obligation. The Act simply does not anticipate simultaneous carriage of both the NTSC and ATV signals during the transition to HDTV.⁷

⁶ Conf. Rep. No. 102-862, 102d Cong., 2d Sess. 67 (1992); See also S. Rep. No. 92, 102d Cong., 1st Sess. 85 (1991) (“Senate Report”); H.R. Rep. No. 628, 102d Cong., 2d Sess. 94 (1992) (“House Report”) (“[T]he Committee realizes that differences in quality are expected among the different types of signals (i.e., digital v. analog)...”)

⁷ Similarly, the Commission can not find a basis to extend cable operators must-carry obligations under section 614 (b)(3), which requires operators to carry “program-related material carried in the vertical blanking interval or on subcarriers.” 47 U.S.C. §534(b)(3). This provision only requires carriage of material in the VBI that is “integrally related” to the primary video programming. In the Matter of Broadcast Signal Carriage Issues, Report and Order, MM Docket No. 92-259, 8 FCC Rcd 2965, ¶81

Moreover, as we have pointed out, the must carry provisions of the 1992 Cable Act are themselves undergoing judicial review. Turner Broadcasting System v. FCC, 114 S.Ct. 2445 (1994). In Turner, the Supreme Court remanded the case to the three-judge panel that had originally upheld the law because it was unable to conclude that Congress had an adequate factual basis to support a law infringing on cable operators' and cable programmers' First Amendment rights. With the issue still to be decided by the Court in the analog context, there is no reason for the Commission to rush into a decision as to any new digital services. Given uncertainty as to whether the *existing* rules will stand up to constitutional scrutiny, it would be unwise for the Commission to pile on further intrusions on speech by instructing cable operators to turn over yet more capacity for the carriage of new broadcast signals that were not even contemplated when the Act was passed and for which a factual basis is wholly lacking.

**B. The Government at Least Must Demonstrate That
Broadcasting is in Jeopardy in Order to Justify
Extending the Must Carry Rules**

The Government would have a hefty burden to justify further interference with cable operators' and cable programmers' First Amendment rights.⁸ As observed by the plurality in Turner, “[i]n defending the factual

(1993), citing WGN Continental Broadcasting v. United Video, 685 F.2d 218 (7th Cir. 1982). Congress was quite clear that the term “program-related” was to be narrowly interpreted. House Report at 101 (integral matter such as subtitles for hearing-impaired viewers and simultaneous translations into another language).

⁸ The government has twice failed to show that absent mandatory carriage requirements, the broadcast system is seriously threatened financially. Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1460 (D.C. Cir. 1985), cert denied 476 U.S. 1169 (1986) (protection of individual broadcast stations is not an adequate justification for imposing broad must carry requirements) and Century Communications Corp. V. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert denied, 486 U.S. 1032 (1988).

necessity for must-carry, the Government relies in principal part on Congress' legislative finding that, absent mandatory carriage rules, the continued viability of local broadcast television would be 'seriously jeopardized.'" 114 S.Ct. 2445, 2470 (1994). The Court admonished that "[t]he Government must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." 114 S.Ct. at 41.

In its June 1994 decision, the Supreme Court concluded in the Turner case that the appropriate standard by which to evaluate the constitutionality of the must carry law is the intermediate level of scrutiny applicable to content-neutral restrictions on speech. United States v. O'Brien, 391 U.S. 367, 377 (1968).⁹ Under the O'Brien test, the Government must meet a series of requirements. First, it must make the threshold showing that its regulation "furthers an important or substantial governmental interest" and that "the governmental interest is unrelated to the suppression of free expression." Id. The failure to satisfy these requirements invalidates the regulation. If these requirements are met, the Government must still show that the infringement of First Amendment rights is "no greater than is essential to the furtherance of that interest," that is, that it is narrowly tailored to that interest. Id.

In applying the O'Brien test, the Turner Court asked "first whether the Government has adequately shown that the economic health of local

⁹ The First Amendment generally abhors the government favoring one class of speakers at the expense of another class of speakers. See Buckley v. Valeo, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment") The presumption against discrimination in speech varies depending on whether it is content-based or content-neutral.

broadcasting is in genuine jeopardy and in need of protections afforded by must carry.” 114 S.Ct. 2445. Assuming an affirmative answer to the question, the Court found that “the Government still bears the burden of showing that the remedy it has adopted does not 'burden substantially more speech than is necessary to further the government's legitimate interests.” 114 S.Ct. at 2469 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 799). Based on the record before it, the Court determined that it was unable to conclude that the Government had satisfied either inquiry. The case was, therefore, remanded to the district court for further fact-finding.¹⁰

If the test is whether or not broadcasting is in jeopardy and the Court sent the case back to prove it, then how can the Commission find that any new channels or services -- whose carriage was not even contemplated when the law was enacted -- are entitled to must carry protection? The Commission would have to surmise a “factual” record composed of fantasy to conclude that the broadcast industry is in peril unless cable carriage is mandated for new, digital offerings.¹¹ Simply asserting a substantial governmental interest in the carriage of digital broadcast services in the abstract fails the Constitution’s hurdle erected in Turner. The Government must support that finding by demonstrating that without such carriage, harm to the system of broadcasting is real.

As we have argued in the ongoing must carry litigation, the current must carry law is over inclusive - - requiring carriage regardless of why

¹⁰ Four justices dissented from the decision, concluding that the must carry law violated the Constitution under either a content-based or content neutral analysis.

¹¹ These offerings will be freely switching back and forth between SDTV program streams, an occasional HDTV program, data and other unrelated services. Fourth Notice at ¶4.

carriage is denied and regardless of the economic state or availability of the broadcast stations in any community. At the time Congress enacted the must carry provisions of the 1992 Cable Act, local television stations operated one channel in a market. While Congress could have anticipated that broadcasters would convert to HDTV, it declined to mandate dual carriage of NTSC and HDTV channels licensed to a local broadcast station. And it did not intend to protect each and every single video service offered by a broadcast station, much less a passel of services offered by a station, regardless of the health of the broadcast system as a whole.¹²

As we enter the digital world, a policy that further exalts broadcast television over cable will have tremendous adverse consequences for cable operators. The Turner court recognized that today the must carry rules burden cable operators by “reduc[ing] the number of channels over which cable operators exercise unfettered control . . .”. 114 S.Ct. at 2456. In addition to devoting a large portion of their capacity for analog broadcast stations, cable operators must set aside capacity for leased access and public, educational and governmental channels. And a large and ever-increasing number of national and regional satellite-delivered cable programming networks are eager for carriage. Cable operators also will be looking to use their capacity to deliver telecommunications services.¹³

¹² Senate Report at 60 (must carry law designed to prevent the “erosion of the local broadcast system”); *Id.* at 36 (“ensure that our system of free broadcasting remain vibrant”). See Turner Broadcasting System, Inc. v. FCC, 819 F. Supp 32, 40 (law designed “to preserve local broadcasting”); *Id.* at 45 (“to assure survival of local broadcasting”). See Turner, 114 S. Ct. at 2461 (the provisions are designed to guarantee the survival of a medium).

¹³ For example, valuable cable capacity could be unavailable for such services if operators must accommodate digital broadcast signals that are constantly changing size. Indeed, operators would have to install expensive headend processing equipment to allocate and

Under must carry, operators lose the ability to add new services, to invest in new programming, to use channel capacity most efficiently, and ultimately to compete more effectively with other multichannel program providers. In the absence of a must carry requirement cable operators can be expected to provide carriage of programming services of interest to viewers. There is no reason to assume cable operators will not carry HDTV signals that subscribers want. This willingness to carry desirable broadcast signals dates back to the earliest days of cable television. But it is one thing to foster a policy that operators may carry a broadcast service; it is another, potentially unconstitutional thing to insist that operators must carry those signals, regardless of viewer interest. Indeed, it is unfair, and throws Commission and Congressional policy off a fact-based track, to require cable operators to devote extensive free capacity to new digital services.

The must carry scheme is equally detrimental to cable programmers by "rendering it more difficult for [them] to compete for carriage on the limited channels remaining." 114 S.Ct. at 2456. For every channel dedicated to a broadcast station, one less piece of capacity is available for the carriage of a cable programming network, which also may be offering high definition or advanced television service desired by cable customers. The cable programmers' ability to access cable systems is critical to reaching an audience and developing a successful and economically viable service. If cable operators cannot carry a particular programmer because of must carry obligations, that programmer has no avenue to reach cable viewers. Unlike the must-be-carried broadcast station it has no over-the-air recourse.

reallocate the data stream for signals delivered in high capacity HDTV at certain times of day and lower capacity, lower quality SDTV at other times.

There are approximately 137 national and 41 regional cable programming networks vying for carriage, with at least another 48 networks poised to be launched in the near future.¹⁴ Cable channel capacity now and for the foreseeable future is constrained with 22% percent of all cable systems having capacity of less than 30 channels and 86% offering less than 54 channels.¹⁵

As cable operators upgrade their systems with fiber and digital compression technology, history has shown that the supply of available cable programming services increases to fill the unused space.¹⁶ And as cable companies prepare to compete in telecommunications, they are expected, and intend, to utilize capacity to deliver innovative and interactive video, voice and data services. The mere availability of capacity alone, however, is no basis for the Government to require cable operators to discriminate against one set of speakers in favor of another.

C. Broadcasters Should Not Be Permitted to Unfairly Leverage Retransmission Consent Rights to Gain Carriage of New Digital Services

Even if the Commission decides not to impose must carry obligations for new digital broadcast services, we urge the agency to be mindful of broadcaster incentives to coerce cable systems to carry these services by

¹⁴ NCTA, Cable Television Developments (Fall 1995) at 6, 78-94, 103-117; In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, Comments of NCTA at 32 -33 (and supporting tables in Appendix E).

¹⁵ NCTA, Cable Television Developments (Fall 1995) at 10-11, citing Warren Publishing, Inc., Television & Cable Factbook, Services Volume No. 63, 1995 at 1-77.

¹⁶ NCTA, Cable Television Developments (Fall 1995) at 6.

exploiting retransmission consent rights. This is an area that calls out for thoughtful Commission oversight. Under the retransmission consent provisions, cable operators must negotiate for the right to carry broadcast stations that choose not to exercise their must carry rights. 47 U.S.C. § 325(b). Powerful broadcast stations have the capability to unfairly leverage their retransmission consent rights by demanding that additional signals be carried as well.

In order to forestall the incentive to engage in such practices, the Commission should consider adopting regulations in the ATV proceeding that would prohibit unfair or coercive behavior or the exercise of undue influence by broadcast station owners over cable operators in retransmission consent negotiations. These rules would be similar to the FCC's broad authority to regulate program access and program network agreements under the 1992 Cable Act, 47 U.S.C. §548, and could properly forbid retransmission consent agreements that require carriage of a video service that is itself broadcast and therefore available to the public. Without such rules, the disparate bargaining power of the two sides could result in cable operators having no choice but to concede to demands for carriage of digital broadcast services as the price for gaining carriage of major market network affiliates.

Indeed, the power of the retransmission provisions of the 1992 Act may overtake whatever rules the FCC adopts with respect to must carry, unless safeguards are established in this proceeding. Up until now, retransmission consent has been granted by broadcasters based on the carriage of one or two traditional satellite video services controlled by the broadcaster. The process has obviously benefited those satellite networks vertically integrated with a broadcaster and there has been some ability of operators and broadcasters to

lead to workable arrangements, despite the evident dissatisfaction of satellite networks not aligned with a broadcaster.

Were the FCC to allow unrestricted rights of broadcasters to demand carriage of multiple additional services -- all tied to the continued right to carry the long-established, usually network-affiliated signal -- the delicate, if not entirely satisfactory, balance that now exists in the carriage environment would be cast asunder. The public's disappointment when network affiliates were dropped for even short periods of time during the 1993 retransmission consent negotiations would be extended by allowing unlimited negotiation muscle to be held by multichannel broadcasters bent on securing, through retransmission consent, placement of all of their services on the operator's system.

And it is necessary to remember that, in the final analysis, it is the FCC's own TV licensing policies, creating limited numbers of channels in each market, and therefore exclusivity and immense value for the broadcasters in each community, that empowers the broadcasters in these negotiations. An NBC affiliate has negotiation strength not simply because of the desirable programming offered by NBC, but by the limited number of outlets that gave rise to network television in the 1950s and the awesome audience-creating consequences of that allocation decision. Retransmission consent is not a consent to use privately created property but consent to use property whose value is irrevocably tied to the governmental grant process that maintains its scarcity in society.

To allow private parties in retransmission negotiations to use that government-created might to insist on a never-ending number of channels to be carried as a requirement to carry the long-established service is contrary

to viewer interest. Whatever may be said for the market aspects of a retransmission consent negotiation, the FCC cannot allow such piling-on of HDTV or other signals, especially signals that are themselves further extensions of government grants.

* * * *

In sum, during the transition period, the Commission should not impose additional carriage requirements on cable for the small percentage of the public that will have digital sets, particularly where it has not been demonstrated that carriage of unknown digital services has anything to do with preserving free over-the-air television. Indeed, we are a factual galaxy away from a finding that a threat to broadcasting exists from the lack of carriage of multiple digital services.¹⁷ Broadcast stations should only be entitled to exercise must carry and retransmission consent rights with respect to one signal from an NTSC/ATV pair.

After digital is the predominant medium and the NTSC spectrum has been recovered, any must carry requirements still in effect will have to be redefined. While no one knows what the fully digital world will look like, we submit preliminarily that broadcasters should only be entitled to carriage of one signal after transition to digital -- that is, one video program service (not 6 Mhz), either HDTV or SDTV. The broadcast industry will be sufficiently served by carriage of a single signal. As the Commission has previously

¹⁷ In addition, if the FCC reverses its prohibition on the ATV channel as a stand-alone subscription service or allows some subscription services to be transmitted in the spectrum, there is surely no justification for requiring cable systems to devote free channel capacity to new pay services or to permit them to be part of a retransmission consent arrangement. See Memorandum Opinion and Order/Third Report and Order/Third Further Notice of Proposed Rulemaking, MM Docket No. 87-268, 7 FCC Rcd. 6924, ¶75 (1992).

stated, the purpose of must carry is not to protect each broadcast station from the verdict of a competitive marketplace.¹⁸

II. THE COMMISSION SHOULD NOT IMPOSE THE BROADCAST DIGITAL STANDARD ON CABLE OR OTHER MEDIA

As we have pointed out in this proceeding, the advanced television standard adopted for broadcast licensees is likely to possess the design and transmission characteristics most suitable for broadcast television. Similarly, every distribution medium should have the opportunity to develop an advanced television system that optimizes its unique capabilities and available tools, rather than be forced into a single standard. Cable television serves over two thirds of American households. Applying the broadcast transmission standard to cable systems could artificially constrain cable's delivery of advanced television service and other technologies to the majority of the public.

In fact, cable and other multichannel distribution media have begun deploying a variety of innovative approaches to the delivery of digital technology to their subscribers. As this technology evolves, these companies will be experimenting with features and functions that maximize their delivery capabilities. A government-mandated digital broadcast standard applied to all media can only stifle rapidly changing developments in this field to the detriment of consumers. Moreover, the flexibility that the Commission proposes for broadcast television stations could be denied to other media constricted by the digital broadcast scheme.

¹⁸ See Quincy Cable TV, Inc. v. FCC, 768 F.2d. 1434, 1460 (D.C. Cir. 1985), cert denied 476 U.S. 1169 (1986).

Therefore, we urge the Commission not to bind cable and other video providers to new digital broadcast standards. There should be no direct mandate to comply with a particular modulation or transmission scheme. Nor should there be an indirect requirement that cable operators bear the costs of modifying their systems to maintain backwards compatibility with broadcasting. We are confident that interoperability and compatibility among media can be achieved voluntarily in the marketplace.

CONCLUSION

All of the assumptions underlying the transition to HDTV are to be revisited here in an effort to promote the introduction of a "dynamic and flexible" digital broadcasting environment. For the foregoing reasons, we urge the Commission not to achieve this goal by imposing further intrusions on cable operator and cable programmer First Amendment rights through mandatory carriage requirements. Additionally, the Commission should not chill technological innovation in the field of advanced television by imposing the broadcast digital standard on other distribution media.

Respectfully submitted,

A handwritten signature in cursive script, reading "Daniel L. Brenner/lpp", written over a horizontal line.

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